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Nos. 14-556, 14-562, 14-571, 14-574

IN THE

Supreme Court of the United States

OBERGEFELL, JAMES, ET AL.,
PETITIONERS,

v.

HODGES, RICHARD, ET AL.,
RESPONDENTS.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR *AMICI CURIAE* EQUALITY OHIO, EQUALITY OHIO EDUCATION FUND, AND THREE GAY AND LESBIAN COUPLES IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

This brief is being submitted on behalf of Equality Ohio and Equality Ohio Education Fund, along with three gay and lesbian couples, each of whom is in a committed, long-term relationship. Equality Ohio is a 501(c)(4) non-profit organization whose mission is to achieve fair treatment and equal opportunity for all Ohioans, regardless of their sexual orientation. It was founded in 2005 after Ohio voters passed the constitutional amendment banning gay marriage and civil unions that is at issue in this case. Equality Ohio Education Fund is a 501(c)(3) non-profit educational organization sharing the same goals. Together, they are supported by more than 135,000 Ohioans from around the state. The particular harms suffered by the three amici same-sex couples are more fully described *infra* at 11.

Amici, who filed a brief in support of petitioners-plaintiffs in the Court of Appeals, seek to obtain equal treatment with other Ohioans, and in particular to secure the very significant and concrete rights and benefits, and to accept the obligations, that come with marriage for straight couples in Ohio. The ban on marriage for same-sex couples in Ohio is particularly egregious because it

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[1] This brief is filed with the consent of all parties. No counsel for a party authored this brief in whole or in part, and no one other than the amici or their counsel contributed money that was intended to fund the preparation or submission of this brief. Amici had additional counsel for their brief in the Court of Appeals who conducted much of the research for this brief. None of those counsel is counsel for a party in this Court.

not only denies gay couples access to marriage, but expressly prohibits civil unions or any other similar legal relationship.

STATEMENT OF THE CASE

The petition in this case covers two separate cases from Ohio. The first, on which this brief will focus, was originally filed by petitioner James Obergefell on behalf of his husband, John Arthur, whom he had legally married in Maryland. Petitioner sought to have his spouse's death certificate reflect that marriage, but Ohio officials refused, insisting that the couple was not married. That refusal was based on Article XV, section 11 of the Ohio Constitution (the "Constitutional Amendment"), which states that:

> Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

Obergefell was subsequently joined as a plaintiff by petitioner David Michener, who also sought to correct the death certificate of his deceased spouse William Ives, whom Michener legally married in Delaware.

The District Court held that Ohio's ban on marriages by same-sex couples was unconstitutional, and another District Court in Ohio sustained a similar challenge by petitioners Brittani Henry and others. On appeal, the two Ohio cases were heard along with similar challenges to similar laws from judgments favoring the plaintiffs in cases from Michigan, Kentucky, and Tennessee. A divided Court of Appeals reversed. In upholding the laws of all four states, the majority essentially justified its ruling on two bases: (1) the states were doing no more than upholding the traditional definition of marriage, even though they enshrined their bans in their Constitutions; and (2) the states had done no more that decide to subsidize opposite-sex marriages in order to create an incentive for opposite-sex couples to procreate in marriage, instead of outside of it. It so ruled even though the benefits of marriage extend far beyond opposite-sex couples who wish to have children, while the law also denies same-sex couples who have children and are raising them as their joint parents the benefits afforded opposite-sex couples whether they have children or not. Before demonstrating why those purported justifications are legally insufficient, we first explain the harms that same-sex couples are denied as a result of Ohio's ban on marriages by same-sex couples, as well as banning any other relationship "that intends to approximate the design, qualities, significance or effect of marriage."

OHIO'S CONSTITUTION DEPRIVES SAME-SEX COUPLES OF IMPORTANT RIGHTS AND OBLIGATIONS AVAILABLE TO OPPOSITE-SEX MARRIED COUPLES.

For generations the laws of Ohio have recognized the institution of marriage. As shown in the Addendum to this brief, Ohio Revised Code Annotated § 3101.01 today limits the right to marry to one man and one woman, and states the ages at which they may marry, as well as precluding marriage if the persons are "nearer of kin than second cousins." At one time Ohio banned inter-racial marriages, but that ended in 1877.[2] Other than those limits, until the issue of marriages for same-sex couples arose, there is no history of Ohio treating marriage as anything other than the state's recognition that a couple that wished to marry agreed to accept the benefits and burdens of marriage. There is no evidence that the state created the institution of marriage in order to confer a subsidy or benefit to those who chose to marry. To the extent that benefits now flow from marriage, it is because Ohio created such benefits and decided that married couples should be among the beneficiaries. And there is not a hint anywhere that Ohio choose to limit marriages to opposite-sex couples because, like taxi medallions in New York City, they were in short supply, and the State could not afford more. But with

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[2] Brief of the National Association for the Advancement of Colored People as Amicus Curiae, *Loving v. Virginia*, 388 U.S. 1 (1967)1967 WL 113930, at 2, note 2.

the enactment of the Constitutional Amendment, Ohio has now excluded otherwise eligible couples from being married solely because the couple are both of the same gender.

Ohio not only prohibits lesbian and gay couples from marrying in Ohio and refuses to recognize their lawful, out-of-state marriages (including recognition of non-Ohio marriages on a death certificate), but also bars civil unions or any formal relationship resembling marriage Ohio's Constitutional Amendment could hardly be more explicit when it states that "[t]his state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the *design, qualities, significance or effect of marriage.*" Ohio Const. art. XV, § 11 (emphasis added).

This language on its face prohibits Ohio from providing even specific, discrete benefits to gay and lesbian couples, such as the right to make medical decisions for one's partner in case of emergency, or the right to participate as a family member in a health insurance plan. In other words, gays and lesbians in Ohio are permanently disabled under Ohio law from being treated as anything other than second-class citizens. This is as true for the corrected death certificates sought by the Obergefell petitioners as it is for the more expansive benefits and recognition sought by amici. Because the Constitutional Amendment applies to marriage and to any legal status that might provide benefits as an alternative to marriage, the issue before the Court is whether Ohio's prohibition on lesbian and gay people from ever obtaining *any* rights as committed couples passes constitutional muster.

Set forth below are an illustrative, although not exhaustive, description of the more significant rights and benefits that are not available to same-sex couples in Ohio:

- **Income tax**. Ohio law authorizes only married couples to file joint tax returns. *See* Ohio Rev. Code Ann. § 5747.08(E); *see also* Ohio Dep't of Taxation, Individual Income Tax: Who Must File, *available at* http://www.tax.ohio.gov/ohio_individual/individual/who_must_file.aspx (explaining that gay and lesbian couples who file federal income taxes jointly must still file Ohio state income taxes separately). For couples such as amici, who keep joint accounts and co-own property, being able to file joint returns that reflect their financial interconnectedness, would obviate the unnecessary complication and expense of filing taxes as if they lived separate financial lives. In addition, for some couples, filing jointly would reduce their overall tax burden.

- **Retirement and health benefits for public employees**. Public employees in Ohio are entitled to participate in generous state retirement plans and access affordable healthcare for their families. However, some of the most favorable benefits available under the Ohio Public Employees Retirement System and the Ohio Police & Fire Pension Fund are available *only* to the "spouse" of a retiree, and not to any other designated beneficiary. *See, e.g.*, Ohio Rev. Code Ann. § 145.45(B)(2)(a) (providing benefits to "qualified survivors," including a "surviving spouse"); Ohio Rev. Code Ann. § 742.02 (creating the Ohio Police &

Fire Pension Fund "for the purpose of providing disability benefits and pensions to members of the fund and their surviving spouses, children, and dependent parents"). Some public employees, including amicus Sarah Marshall, purchase health insurance through a medical plan sponsored by the State. An employee's spouse can join the plan for a nominal fee, but gay and lesbian partners, including Sarah's partner Tara, are not allowed to do so.[3]

- **Family and parenthood**. Ohio law has been interpreted as barring lesbian and gay partners from jointly adopting children. Ohio Rev. Code Ann. § 3107.03(A) (permitting joint adoptions by "husband and wife"). Even where a gay or lesbian individual, prior to cohabitating, lawfully adopted a child, Ohio law prevents a same-sex partner from later becoming a second parent to that child. Curiously (and irrationally), state law nonetheless authorizes single individuals – gay and straight - to adopt. Ohio Rev. Code Ann. § 3107.03(B) (an "unmarried adult" may adopt). However, if a gay or lesbian individual enters into a committed, long-

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[3] *See* Ohio Police & Fire Pension Fund, Member's Guide to Health Care Coverage for 2014 at 5-7, *available at* http://www.op-f.org/Files/HCmemberGuide2014.pdf (listing eligible beneficiaries as a spouse, child, or dependent parent); Ohio Dep't of Admin. Servs, State of Ohio Employee Benefits Guide 5 (2014-15), *available at http://das.ohio.gov/Portals/0/DASDivisions/HumanResources/BA/pdf/New%20Employee%20Guide%202014-15%20-%20Updated%2020150210.re.pdf* (listing as eligible beneficiaries "[y]our current legal spouse as recognized by Ohio law."); *id.* at 7 ("Examples of persons NOT eligible for coverage as a dependent include . . . Same-sex partners" (emphasis in original)).

term relationship and lives with his or her partner, the State prevents that child from benefiting from having two loving parents rather than only one. *See In re Adoption of Doe,* 719 N.E.2d 1071 (Ohio Ct. App. 1998) (prohibiting "second parent" adoption by lesbian partner of child's biological mother). Further, the inability to establish a legally recognized parent-child relationship excludes gay and lesbian couples and their children from the many rights and obligations attendant to the parent-child relationship arising under other provisions of Ohio.[4]

- **Healthcare decisions.** Ohio law presumes that gays and lesbians are not qualified or permitted to make medical decisions on behalf of their committed, long-term partners. In the absence of an advance health-care directive, the following individuals, in order of priority, are appointed as surrogates: the patient's guardian, spouse (which does not include a same-sex partner), adult child, parent, sibling, or the nearest adult

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[4] *See generally, e.g.*, Ohio Rev. Code Ann. Title 1 (State Government § 144.02 benefits for "dependents and survivors" of municipal employees); Ohio Rev. Code Ann. Title 29 (Crimes §§ 2907.01(L), 2907.02(A), rape exception for spouse); Ohio Rev. Code Ann. Title 31 (Domestic Relations § 3103.03, obligations to support only extends to spouse and minor children of parent); Ohio Rev. Code Ann. Title 33(Education - § 3331.12, prohibiting child under age of 14 from working for person not parent or guardian); Ohio Rev. Code Ann. Title 58 (Transfer to Minors Act, § 5814.01(J) ("Member of the minor's family" means "a parent, stepparent, spouse, grandparent, brother, sister, uncle, or aunt of the minor, whether of the whole or half blood, or by adoption").

relative not already described. Ohio Rev. Code Ann. § 2133.08(B). Ohio does not authorize a gay or lesbian partner to be in that line of succession.

- **Probate, transfer of assets, and statutory claims.** Ohio estate law protects and provides for surviving spouses, but denies those rights to surviving gay and lesbian partners. Same-sex partners are prevented from obtaining the elective share a surviving spouse is able to take from the decedent's estate, even when the decedent's will makes no provision for such support. Ohio Rev. Code Ann. § 2106.01.[5] That property can be used to support the surviving spouse and the couple's minor children. The surviving spouse may also elect to receive the decedent spouse's entire interest in the couple's home. *See* Ohio Rev. Code Ann. § 2106.10. Additionally, same-sex partners are not included in the laws of intestate succession. *See* Ohio Rev. Code Ann. § 2105.06.

Gay men and lesbians in Ohio are also excluded from statutory rights of action for wrongful death—the cause of action is "for the exclusive benefit of the surviving spouse, the children, and parents of the decedent," which excludes a surviving same-sex partner. Ohio Rev. Code Ann. § 2125.02(A)(1). Similarly, if there is a workplace accident resulting in death, a spouse—but again,

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[5] Other laws are also interrelated with Ohio's scheme of intestate succession. For example, where an owner of securities has not filled out a "beneficiary form," upon death the security is transferred in accordance with the order of precedence established by the Trusts Code, which does not include same-sex spouses. *See* Ohio Rev. Code Ann. § 1709.01.

not a gay or lesbian partner—is authorized to collect worker's compensation. Ohio Rev. Code Ann. § 4123.59(D)(1). And while spouses of certain public employees (such as firefighters, like Sarah Marshall) who die in the line of duty are entitled to statutory death benefits, same-sex partners are excluded from these benefits. Ohio Rev. Code Ann. § 742.02.

• **Misc. Duties.** With rights, of course, come obligations. Gay and lesbian couples in Ohio are not only prohibited from receiving any of the benefits of marriage, but they are also exempt from any of its responsibilities. Thus, when a gay or lesbian couple separate, there are no available options for legally-sanctioned divorce, alimony, or child support. *See* Ohio Rev. Code Ann. § 3105.10(A) (divorce only available for those in a "marriage"); Ohio Rev. Code Ann. § 3105.171, 3105.21 (divorce proceeding needed to enter orders related to the disposition of property, alimony, and child custody).

Other duties outside the family also do not apply to gay and lesbian couples. Thus, a state employee who is gay or lesbian is not required to disclose information about his or her partner for conflict of interest purposes. *See, e.g.*, Ohio Rev. Code Ann. § 102.01(D) (defining "immediate family" as "a spouse residing in the person's household and any dependent child"); Ohio Rev. Code Ann. § 102.02(A)(1) (requiring disclosure by state government officials of names under which a spouse conducts business); Ohio Rev. Code Ann. § 102.03(C) (prohibiting public officials and employees from participating in any license or rate-making proceeding that affects the license or rates

of a business owned or controlled by immediate family).

These harms have directly injured the three amici couples as well as other gay and lesbian couples represented by Equality Ohio. Thus, Tara Robertson and Sarah Marshall have been together in a committed relationship for the past four years. Both have lived in Ohio their entire lives, and would like to marry in their home state. Sarah works as a firefighter and paramedic for the City of Dayton, and Tara works as an auto mechanic. They would like to file joint tax returns and participate jointly in the state health system. They are not permitted to do either solely because they are lesbians.

Timothy Broud and Richard Moore have been together for approximately twenty-four years and plan to marry. Each has lived in Ohio his entire life. Timothy has suffered from major health issues in the past, and Richard has always been there for him during hospital stays. On many occasions, however, hospitals have refused to speak to Richard about Timothy's treatment because he is not a legal spouse.

Angela Wellman and Julie Lamere have been in a relationship for twelve years. In 2005, they traveled from Ohio, where both have lived their entire lives, to Vermont in order to enter into a civil union. Julie works in human resources for a private, non-profit organization, and Angela works as a Student Life Coordinator for the Multicultural Center at Ohio State University. Angela and Julie would like to marry in their home state of Ohio.

These harms are inflicted on amici and all other gay and lesbian couples in Ohio solely

because they wish to marry a person of the same gender. As this Court observed, the protections afforded by these laws are "taken for granted by most people either because they already have them or do not need them [yet same-sex couples are excluded] from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996). In addition to these harms under Ohio law, now that Section 3 of DOMA has been declared unconstitutional, *United States v. Windsor*, 133 S. Ct. 2675 (2013), same-sex couples in Ohio who wish to marry are also denied all benefits under federal law that apply only to couples married under state law.

SUMMARY OF ARGUMENT

No matter what standard of review is applied, the two reasons given by the Court of Appeals do not suffice to sustain the ban on marriages for same-sex couples, civil unions, and all other relationships that might "approximate" marriage. The principal substantive defense offered is that limiting marriage to opposite-sex couples "subsidizes" those marriages, thereby encouraging those couples – and only those couples – to raise their children as a married couple, which will bring stability and other benefits to the children. That rationale is both vastly over and vastly under inclusive. It is over inclusive because (a) marriage among opposite-sex couples is not limited to those who either have or promise to have children; (b) the "subsidy" of marriage extends to many benefits that have nothing to do with children;

(c) the subsidy is not conditioned on parents staying together until all their children reach majority; and (d) the subsidy continues long after the children have left home and are having children of their own.

It is under inclusive because it excludes same-sex couples whose children need the same benefits as do the children of opposite-sex couples in order to develop into happy and productive adults. Moreover, the ban extends beyond marriage to civil unions and similar relationships, yet there is no rationale comparable to the marriage subsidy that could possibly justify applying the ban to civil unions, which denies same-sex couples the other benefits of marriage under Ohio and, after *Windsor,* federal law.

The Sixth Circuit's other justification – "tradition" or, as it sometimes put, the desire to "proceed slowly" – fares no better. Erecting a constitutional barrier against marriage for same-sex couples does not conform to any recognized tradition in Ohio. Moreover, that barrier is a "full stop," not a "go slow" sign, because the amendment makes it impossible for the Ohio legislature alone to change directions in the future. Furthermore, because civil unions are a phenomenon of the 21st century, there is surely no "tradition" as to them, and especially no tradition of denying the legislature the authority to create civil unions and extend the rights available to straight couples to same-sex couples who are ineligible to marry under Ohio law.

The utter irrationality of these laws is clear from total lack of fit between the stated justifications and what Ohio law actually does. Indeed, the State denied the requests of petitioners Obergefell and Michener to correct the death certificates of their

deceased spouses, to whom they were lawfully married out of state, solely because Ohio law bans marriages between same-sex couples. But those denials have no connection whatsoever to the tradition and subsidy justifications accepted by the majority below. Instead, they send out the clearest message that the reasons offered to support Ohio's laws relating to the marriages of same-sex couples are a façade, designed to cover up Ohio's disapproval of the lives of same-sex couples, which this Court made clear in *United States v. Windsor,* 133 S. Ct 2675 (2013), and *Lawrence v. Texas,* 539 U.S. 558 (2003), are constitutionally insufficient.

ARGUMENT

The Justifications Offered by the Court of Appeals for the Ohio Laws Precluding the Provision of Any Rights to Gay Couples in Ohio Cannot Withstand Analysis No Matter What Standard of Review the Court Applies.

Section 3 of the Defense of Marriage Act ("DOMA") excluded same-sex couples from the definition of marriage under all federal laws. In his opinion holding section 3 unconstitutional in *Windsor*, Justice Kennedy emphasized that the ban "touches many aspects of married and family life, from the mundane to the profound . . . [and] divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept were DOMA not in force." 133 S. Ct. at 2694, 95. Many of the same kind of injuries wrought by DOMA are present here: DOMA "prevent[ed]" access

to "government healthcare benefits"; "deprive[d]" gay and lesbian couples "of the Bankruptcy Code's special protections"; "prohibit[ed]" same-sex couples "from being buried together in veterans' cemeteries"; rendered "inapplicable" protections for the family members of United States officials, judges, and federal law enforcement officers; "br[ought] financial harm to children of same-sex couples . . . [by] rais[ing] the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses"; and "denie[d] or reduce[d] benefits allowed to families upon the loss of a spouse and parent, . . . [which] are an integral part of family security." *Id.* at 2694–95.

It cannot be seriously disputed that Ohio's Constitutional Amendment does exactly the same thing here. Just as DOMA worked to "impose restrictions and disabilities" on gays and lesbians, the Ohio Constitution imposes on the Ohio Code and administrative regulations the requirement to deny scores of significant benefits and rights to Ohio citizens, "from the mundane to the profound." *Windsor*, 133 S. Ct. at 2692, 2694. They include financial decisions and financial security, familial relationships and parental obligations, access to healthcare and the authority to make medical decisions for a loved one, and estate planning and the transfer of assets – most of which accrue to married couples without regard to the presence of children. The deliberate withholding of these statutory protections from committed gay and lesbian couples in Ohio offends basic principles of equal protection.

The briefs of the parties and other amici will demonstrate why heightened scrutiny is required. In our view, even if rational basis applied, the Ohio laws

at issue cannot be upheld. The majority opinion of Circuit Judge Sutton essentially offers two reasons why the bans are constitutional: (1) they encourage procreation in marriage by opposite-sex couples, and (2) they uphold traditional marriage, while allowing for future changes. Neither suffices.

At the outset, we note three undisputed facts that, as we explain below, demonstrate conclusively that those reasons cannot sustain Ohio's ban: (1) most of the benefits of marriage for opposite-sex couples are unrelated to encouraging procreation; (2) the laws also preclude civil unions or any other legal arrangement that confers the benefits of marriage on same-sex couples; and (3) the Ohio ban was applied to deny the surviving members of a same-sex marriage performed out of state the right to include on the death certificate of his husband the indisputable fact that he was "married."

Tradition

This argument asserts that the states did no more than maintain a centuries-old tradition of recognizing that marriage is only between a man and a woman, while proceeding cautiously and leaving open the door to marriages by same-sex couples. But if tradition were a legitimate basis for bans on certain kinds of marriages, the challenge to the ban on inter-racial marriages struck down in *Loving v. Virginia*, 388 U.S. 1 (1967), would have come out the other way.

Second, in denying the right of same-sex couples to marry, Ohio did much more than retain the status quo. Such marriages are already precluded by statute, *see* Addendum. The amendment enshrined their second-class status in

the state constitution, hardly the equivalent of going slowly. Judge Sutton also asserted that a constitutional amendment imposing a ban on same-sex marriages was necessary to prevent "courts from seizing control over an issue that people of good faith care deeply about" (Pet. App. 42a), as the Massachusetts Supreme Court did when it found that denying the right to marry to same-sex couples violated its state constitution. *See Goodridge v. Department of Public Health*, 798 N.E.2d 941 (2003). But if that is all that was intended, a much narrower amendment would do the job, either by barring state courts from hearing such claims, or adding to the state constitution a provision stating that "Nothing herein shall be construed to create a right to marriage by persons of the same sex." Either route would have made it clear that the state legislature could end the ban, but that the state courts could not.

Third, Ohio also bans civil unions that would at least allow same-sex couples to enjoy benefits such as the right to adopt the partner's children, to visit a partner in the hospital, and to file joint income tax returns. Because civil unions are less than two decades old, there is no tradition at all with respect to them, let alone a tradition of excluding same-sex couples from tangible benefits enjoyed by opposite-sex couples. And by amending its constitution to forbid the Ohio legislature from enacting laws permitting civil unions – or anything resembling them – Ohio went full speed ahead to deny rights and did not simply act to preserve the status quo.

Fourth, Ohio's refusal to allow a same-sex plaintiff who was legally married in another state from stating on his spouse's death certificate that they were "married," is totally unprecedented. Ohio

made no effort to show that it ever questions the asserted marital status of a deceased, let alone that it ever challenged that status. If there had been such a tradition, Ohio would surely have offered evidence that what it did here was no more than a variation of what it regularly does in completing death certificates.

In the end, invoking tradition is another way of saying, "this is the way we've always done it, and we have no obligation to change." That may be an explanation of *how* the law got to where it is now, but it cannot provide a justification for *why* it should remain that way, let alone how it comports with the requirements of Equal Protection.

Encouraging Responsible Procreation

The initial premise of this argument is the undisputed fact that only opposite-sex couples can cause unintended pregnancies. The Court of Appeals majority also contended that a state could reasonably conclude that children produced by individuals who are not married have less favorable outcomes than are children raised by parents who are married. Even if that second conclusion were correct, it does not in any way justify denying same-sex couples the same opportunity to marry and raise their children as dual parents, just like opposite-sex couples. To sustain the exclusion, the Court of Appeals asserted that permitting marriage for opposite-sex couples only was a legitimate means of "subsidizing" the decision to have children within a marriage, rather than outside it. Pet. App. 35a.

That conclusion cannot withstand analysis because there is not the slightest evidence – historic or submitted in the courts below – that anyone, until

this case, claimed that marriage was a form of subsidy, like providing free lunches for school children whose families have income below the poverty level. Moreover, the remedy – limiting marriage to opposite-sex couples – sweeps in vast numbers of people for whom no such incentive is needed or even relevant. Those include the old, the infertile, and those who have no intention of have children. It is also vastly over-inclusive because marriage confers a range of benefits – such as filing joint tax returns, obtaining spousal health insurance, and making health care decisions for a partner who is unable to act on his own – that having nothing to do with procreation of children. In addition, the subsidy is not conditioned on the married couple staying married until their children reach majority, and it continues long after the children have left the home.

Nor is it reasonable to refer to marriage as a form of subsidization of a decision to procreate within a marriage. If that kind of subsidization were actually intended. it would have taken the form of cash payments or tax credits to those who give birth to children in a marriage *and* stay married until the children reach majority. No rational person would conclude that a one-time "payment" of a marriage certificate could possibly be appropriate compensation for what in theory is a promise to raise their children as a married couple, let alone that such subsidy can be justified for the married couples who never have children.

If the government is actually providing a subsidy, such as school lunches, it makes sense to set limits in order to control costs. But there is no hint that there is a limited supply of either marriage

certificates or the benefits that flow from marriage. No one has suggested that Ohio would repeal the laws allowing the filing of joint income taxes, or granting health benefits to married couples, or allowing married couples to make health care decisions for their spouses or inherit their property if there were no will, even if tens of thousands of Ohio residents suddenly decided to marry, thereby vastly increasing the level of the current "subsidy." That is because the decision to deny same-sex couples the right to marry has nothing to do with any form of traditional subsidy known in the law, and is nothing more than an effort to defend the indefensible.

Furthermore, if encouraging families to have stable relations is a goal of the ban, it is irrational to deny children of same-sex couples the benefits of stable families by having two legally recognized parents instead of one. Ohio already allows responsible single adults, including gays and lesbians, to adopt a child; only irrationality can possibly explain why such a child would not be better off having two responsible adult to raise him or her, no matter what their sexual orientation may be.

The ban also applies to civil unions between same-sex couples. By definition, same-sex couples do not need an incentive for responsible procreation, but the desire to reward opposite-sex couples for procreating responsibly cannot justify a ban on the wholly separate status of civil unions. If the ban did not extend to civil unions, same-sex couples would still not receive the "subsidy" of being able to say that they are married, although they would be able to receive the other benefits of such a status. However, the inclusion of the ban on same-sex civil unions and all similar relationships further demonstrates that

the procreation subsidy theory cannot support that aspect of the ban, yet there is no other justification offered to sustain it.

Finally, in Ohio (and not disclaimed by any other state or Judge Sutton), the prohibition extends to denying the surviving member of a same-sex marriage the right to have the status of the relationship with his deceased spouse listed on the death certificate as "married," which is a description of what lawfully occurred in another state. There could not possibly be any connection between the subsidy of encouraging opposite-sex couples in Ohio to procreate within a marriage, and refusing to allow same-sex couples married outside of Ohio to state on the death certificate of one member of a couple the fact that they were legally married elsewhere. The Obergefell petitioners were not seeking any state-conferred benefit or subsidy; all they asked was that the State correct the facts asserted on the death certificates of their spouse, so that they are true, and not false. Even accepting every rationale offered by the State to justify banning marriages by same-sex couples, none of them has even the most remote—*i.e.*, rational—connection with what Ohio did here.

Actions speak louder than words. Ohio's decision to reject petitioners' request to correct factually-inaccurate death certificates, to defend that decision in the trial court, and then to appeal the adverse ruling, reveals what is really going on here. Ohio's effort to apply Article XV, section 11 of its Constitution to the facts of this case leaves no doubt that the true reason behind that Amendment is animus against gays and lesbians. Indeed, that application of the ban on marriages for same-sex couples is the proverbial thirteenth stroke of the

clock, making all that came before suspect, not just as applied to death certificates, but to marriages by same-sex couples and civil unions as well.

When all of the rhetoric is stripped away, the ban on same-sex marriages cannot be justified by the reasons given by Judge Sutton. Unless the Court is willing to sustain the prohibitions on marriage by same-sex couples based on no more than "it's OK because we say so, even if we have no good reasons to support it," these bans cannot survive.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the case remanded with directions to re-enter the judgments of the District Courts in these cases.

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ADDENDUM

Ohio Revised Code Annotated § 3101.01

Persons who may marry; same sex marriages against public policy; recognition or extension by state of specific statutory benefits of legal marriage to nonmarital relationships against public policy

(A) Male persons of the age of eighteen years. and female persons of the age of sixteen years, not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage. A marriage may only be entered into by one man and one woman. A minor shall first obtain the consent of the minor's parents, surviving parent, parent who is designated the residential parent and legal custodian of the minor by a court of competent jurisdiction, guardian, or any one of the following who has been awarded permanent custody of the minor by a court exercising juvenile jurisdiction:

(1) An adult person;

(2) The department of job and family services or any child welfare organization certified by the department;

(3) A public children services agency.

(B) For the purposes of division (A) of this section, a minor shall not be required to obtain the consent of a parent who resides in a foreign country, has neglected or abandoned the minor for a period of one year or longer immediately preceding the minor's application for a marriage license, has been adjudged incompetent, is an inmate of a state mental or

correctional institution, has been permanently deprived of parental rights and responsibilities for the care of the minor and the right to have the minor live with the parent and to be the legal custodian of the minor by a court exercising juvenile jurisdiction, or has been deprived of parental rights and responsibilities for the care of the minor and the right to have the minor live with the parent and to be the legal custodian of the minor by the appointment of a guardian of the person of the minor by the probate court or by another court of competent jurisdiction.

(C)(1) Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state.

(2) Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.

(3) The recognition or extension by the state of the specific statutory benefits of a legal marriage to nonmarital relationships between persons of the same sex or different sexes is against the strong public policy of this state. Any public act, record, or judicial proceeding of this state, as defined in section 9.82 of the Revised Code, that extends the specific statutory benefits of legal marriage to nonmarital relationships between persons of the same sex or different sexes is void ab initio. Nothing in division (C)(3) of this section shall be construed to do either of

the following:

(a) Prohibit the extension of specific benefits otherwise enjoyed by all persons, married or unmarried, to nonmarital relationships between persons of the same sex or different sexes, including the extension of benefits conferred by any statute that is not expressly limited to married persons, which includes but is not limited to benefits available under Chapter 4117 of the Revised Code;

(b) Affect the validity of private agreements that are otherwise valid under the laws of this state.

(4) Any public act, record, or judicial proceeding of any other state, country, or other jurisdiction outside this state that extends the specific benefits of legal marriage to nonmarital relationships between persons of the same sex or different sexes shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.